UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/SR.440
20 June 1991

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 440th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 10 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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V.91 25850 0551E
Distr.: 21 June 1991

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The meeting was called to order at 2.10 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 2 (continued)

1. The CHAIRMAN said that article 2 of the draft Model Law (A/CN.9/344, annex) began with some introductory words which he assumed there was no need to discuss. He would therefore invite comments on subparagraph (a). A point that had been raised by the Secretary at the previous meeting and that required discussion was whether a reimbursement relationship was to be regarded as part of the credit transfer referred to in the subparagraph.

2. Mr. FUJISHITA (Japan) said that the issue seemed to be a complex one. On the basis of comments received from business circles and experts in Japan, his delegation felt that the reimbursement relationship should be excluded from the definition. He wished to draw attention in that connection to the comments of the Secretariat on article 1 in document A/CN.9/346 with regard to the question of the internationality of a transfer. As had been pointed out, if a reimbursement relationship was regarded as included in a credit transfer, the fact that the reimbursing bank was located in another country would cause the whole series of operations constituting the transfer to be covered by the Model Law; the originator or the beneficiary might, however, be unaware that the transfer would be regarded as an international credit transfer, and that might be prejudicial to their interests. According to banking practitioners in Japan, the reimbursement relationship was regarded as something quite different from the chain of operations constituting the credit transfer; to include the reimbursement relationship in the definition might therefore cause confusion. Accordingly, his delegation proposed that the reimbursement relationship should not be regarded as part of the original credit transfer but be considered to constitute a distinct credit transfer transaction.

3. If that point was accepted, the actual drafting was less important. His delegation would not insist on the deletion of the second sentence of article 2(a) as proposed in the second paragraph of Japan's written comments on that portion of the text (A/CN.9/347, p. 35), provided that an amendment was made to article 2(h) on the lines proposed there.

4. Mr. GREGORY (United Kingdom) associated himself with the previous speaker's remarks. He considered that, in the example that had been given by the Secretary at the previous meeting, the payment order to the reimbursing bank in the United States should be treated as separate and not as making the original credit transfer international. The present draft did not make clear whether a reimbursing bank would count as an intermediary bank. However, he thought that the second sentence of article 2(a) was useful and could be left as it stood; when the Commission took up subparagraph (h), it could make clear there that a reimbursing bank was not an intermediary bank.

5. Mr. ABASCAL ZAMORA (Mexico) supported the United Kingdom representative's comments. It was true that divergent views had been expressed on the subject in the Working Group on International Payments, but he thought that the

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prevailing view had been that the reimbursement operation would not be part of the credit transfer. The order to a reimbursing bank should, he thought, be regarded as something separate.

6. Mr. VASSEUR (Banking Federation of the European Community) said he thought that in the United Kingdom the situation might be a special one, since clearing agreements existed there which did not exist in other countries. In any case, the subject under discussion related rather to article 1 than to the definition of the term "credit transfer". The wording of article 1(1) had been deliberately broadened; he thought that the current wording would make the Model Law apply where, although the originator's bank and the beneficiary's bank were in the same country, the currency used was that of another country.

7. Mr. BHALA (United States of America) said that his delegation supported the present drafting of the first two sentences of article 2(a). It did not consider that so-called reimbursement relationships should be specifically excluded from the definition. There were some credit transfer systems that were based on simultaneous message and payment, and those might then fall outside the sphere of application of the Model Law. The "credit transfer" definition was a key one and his delegation would be against deletion of the second sentence. It must be made clear that a credit transfer consisted of a series of payment orders.

8. Mr. GREGORY (United Kingdom) said he did not think that the point raised by the Secretary had anything to do with a particular practice existing in the United Kingdom, as the representative of the Banking Federation of the European Community had suggested. The situation described could arise with any two countries. He also wished to make it clear that his delegation was not suggesting the exclusion of reimbursement operations from the effects of the Model Law; the point was merely that in the case described the reimbursement operation would constitute a separate transfer. It would unnecessarily complicate the Model Law to attempt to treat reimbursing banks as intermediary banks.

9. Mr. SCHNEIDER (Germany) said that his delegation was in general agreement with the view expressed by the United Kingdom delegation that the basic credit transfer and the reimbursement were two credit transfers, and that one might be international, and therefore covered by the Model Law, and the other national.

10. A problem arose from the fact that, with the draft as it stood, a "credit transfer" meant the whole series of operations, and if any part of it was international the whole series became international. But where the originator's bank and the beneficiary's bank were in the same country, how could they foresee that the transfer would become an international transfer? The earlier text of article 1, adopted at the Working Group's twentieth session (see document A/CN.9/329, annex), spoke of the Model Law applying "where the originator's bank and the beneficiary's bank are in different States". The new draft raised problems.

11. The CHAIRMAN noted that the point just raised was discussed in paragraph 11 of the Secretariat's comments on article 1 (A/CN.9/346, p. 9).

12. Mr. PELICHET (Hague Conference on Private International Law) said that, in its written comments on article 2(a) (A/CN.9/347, p. 71), the Permanent Bureau of the Hague Conference proposed that the second sentence of article 2(a) should be deleted, but for different reasons than those given by the delegation of Japan. The Permanent Bureau considered that, when a link in the chain was international, the Model Law should apply to the whole transfer. The second sentence of the draft was not only unnecessary but presented a danger, because with it a court might interpret the sphere of application of the Model Law restrictively. It might be possible to find a different wording that would make the matter clear.

13. Mr. HUANG Yangxin (China) said that, with regard to the question of the reimbursement operation, his delegation agreed basically with the comments of the United Kingdom delegation. But there might be a still more complicated situation: bank A might ask bank B in the same country to reimburse bank C in the same country, but bank B might credit bank C through a bank in another country. The relationship between banks A and B should then be treated as domestic. It would be hard to ask bank A, in such a case, to accept the application of the Model Law.

14. Mr. BHALA (United States of America) suggested that, in the interests of ensuring wide acceptance of the Model Law as a viable legal instrument in the international commercial world, the text of the first two sentences of article 2(a) and the definition of an "intermediary bank" in article 2(h) should remain as drafted, since they covered all the different concerns raised with regard to cases in which payment orders and payments were simultaneous and those in which they were not.

15. The CHAIRMAN said that one reason for the proposal to delete the second sentence of article 2(a) was that it might imply that the reimbursement situation, which from some points of view might be regarded as involving separate transactions, was to be included in a credit transfer. As a corollary to that it had been suggested that the definition in article 2(h) might be modified by adding the words "that receives and issues payment orders" at the end of subparagraph (h). However, it had been agreed that the second sentence of article 2(a) was important in that it complemented the definition of an "intermediary bank". If the Commission decided to exclude the reimbursement situation from the chain of credit transfers, treating it instead as a separate transfer, it might ask a drafting group to try to find wording to that effect. He suggested that the second sentence of article 2(a) might be improved if alternative wording was found for the phrase "intended to carry out".

16. Mr. BURMAN (United States of America) said that his delegation would reserve its position on subparagraph (a), since it was still reviewing the implications for simultaneous settlement systems such as that of the Federal Reserve Bank.

17. Mr. FUJISHITA (Japan) said that it was his impression that the majority favoured excluding the reimbursement situation from the original credit transfer transaction. Given that assumption, a flexible approach could be adopted with regard to the wording of subparagraphs (a) and (h) of article 2.

18. Mr. SCHNEIDER (Germany) said that problems would arise in situations where both the originator's bank and the beneficiary's bank were in the same country and where there was only one intermediary bank in another country. It would be difficult to define the rights and obligations of the originator in such circumstances. In the case of revocation, for example, how was the originator's bank to ascertain its rights when different rules applied to domestic and international payments? It was important in such cases to know whether the transaction was or was not international.

19. Mr. ABASCAL ZAMORA (Mexico) said that the issue just raised by the representative of Germany had been discussed at length in the Working Group. Two schools of thought had emerged: the first had been that the application of the Model Law should be as broad as possible, while the second had been that provision must be made for the case in which two banks within one country wished to establish whether a third bank intended to invoke the internationality of a payment order in completing a credit transfer. No solution to that problem had been found in the Working Group, but it would probably not prove to be of major practical significance.

20. Mr. SCHNEIDER (Germany) said that the problem would in fact prove significant because the developing internal market in the European Community would give rise to many transactions of the kind he had mentioned.

21. The CHAIRMAN said that article 94 of the United Nations Convention on Contracts for the International Sale of Goods might be a relevant model for States to use when adopting the Model Law to establish cases to which the Model Law would not apply when the States concerned in the transfer had similar rules on credit transfers.

22. Mr. SCHNEIDER (Germany) said that a situation he had specifically in mind was where the originator's bank was a branch of an international bank in State A, the beneficiary's bank was also in State A and the originator's bank executed the originator's payment order by sending a payment order to its main office in State B. In the European Community that type of transaction would be encountered frequently, but it could also arise more generally in international commercial relations.

23. Mr. GREGORY (United Kingdom) said that the problem of reimbursement to banks could be solved by amending the phrase "intended to carry out" in article 2(a). The first sentence of the subparagraph might have to be changed as well in order to dispose of the ambiguity inherent in the term "series of operations", which might be held to include the transaction of reimbursement. The second sentence was not intended to stand as a definition in its own right, but rather to explain the content of the first; it would therefore be best to combine the two sentences by deleting the full stop after the word "beneficiary" and replacing it by the word "but".

24. The CHAIRMAN pointed out that the United States had already proposed, in its written comments on article 2(a) (A/CN.9/347/Add.1, p. 11), that the expression "series of operations" should be replaced by the words "series of payment orders". The precise wording of article 2(a) could perhaps best be left to the drafting group.

25. Mr. PELICHET (Hague Conference on International Private Law) said that even if the wording was referred to a drafting group, it should be clearly understood that if a single segment of a transfer operation was international in character the entire credit transfer would fall within the scope of the Model Law. Article 1 did not make it clear that when a transaction involved a sending bank and a receiving bank situated in different States, the whole transaction was to be regarded as international.

26. Mr. AL-NASSER (Observer for Saudi Arabia) said that the existing wording of article 2(a) was far from clear and would not make provision for the circumstance in which reimbursement had been made to the receiving bank.

27. Mr. KOMAROV (Union of Soviet Socialist Republics) said that the definition of a credit transfer would be more comprehensive if it envisaged not only the time at which the operation began but also that at which it was concluded. He drew attention in that connection to article 14, which referred to the "completion" of a credit transfer.

28. Mr. LOJENDIO OSBORNE (Spain) said that he would prefer the words "funds transfers" to replace the words "credit transfers" in the title of the draft Model Law, since, at least in Spanish, the present title was very broad in meaning and would include debit transfers, which were not intended to fall within the scope of the Model Law.

29. Mr. ABASCAL ZAMORA (Mexico) said that he believed the problem related solely to the Spanish version of the title of the draft articles. The purport of the term "credit transfers" in the English version was not in doubt.

30. The CHAIRMAN noted that under subparagraph (a) of article 2 the Commission had to consider the question whether the Model Law should apply to transfers affected through a point-of-sale payment system. A difference of opinion existed on the subject. It had to be borne in mind that such systems had not been fully developed.

31. Ms. KOSKELO (Observer for Finland) said that her Government believed that it was inappropriate to exclude point-of-sale transactions from the sphere of application of the Model Law solely on the ground that they involved debit transfers. It was in fact difficult to distinguish between credit and debit transfers in point-of-sale systems. It would therefore be preferable to leave open the possibility for point-of-sale systems to be covered by the Model Law, and accordingly to delete the sentence in square brackets in article 2(a).

32. Mr. FUJISHITA (Japan) said that his delegation too supported the deletion of the sentence, for the reasons given by the previous speaker and also because a specific reference in the Model Law to point-of-sale systems would be premature at the current stage of their development. It would be best to

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leave the matter of the application of the Model Law to a specific point-of-sale system to be interpreted by the legislator or the courts in the light of the provisions in subparagraphs (a) and (b) of article 2.

33. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that, in the absence of a clear definition of a point-of-sale system, his delegation favoured the deletion of the sentence in square brackets in article 2(a).

34. Mr. BHALA (United States of America) said that in his country point-of-sale systems were regarded as giving rise to debit transfers, whereas other countries considered them to generate credit transfers. That divergence of views was a good reason to keep point-of-sale systems out of the Model Law. The Model Law was intended for use by commercial parties for commercial purposes, whereas point-of-sale systems were generally used for consumer purposes and should therefore be outside the scope of the Model Law. The Model Law would be a persuasive document for commercial parties if it was flexibly drafted, but tightly drawn in terms of what it covered. It would be unfortunate to complicate it by extending its regime to systems which had unknown implications.

35. Mr. LIM (Singapore) agreed with the views expressed by the representative of the United States. Electronic funds transfer at point of sale was generally a consumer matter rather than an inter-bank one. He therefore approved the sentence excluding point-of-sale systems from the operation of the Model Law.

36. Mr. ERIKSSON (Observer for Sweden) felt that it was not useful to discuss point-of-sale payment systems as though they were all alike. There were differences between them and certain systems might come within the scope of the Model Law. There was no reason for a specific rule in the Model Law to the effect that it did not apply to point-of-sale systems. He supported the proposal by Finland that the sentence in square brackets should be deleted.

37. Mr. GREGORY (United Kingdom) said that, while his delegation appreciated the concerns expressed by the United States and Singapore, there were provisions in the Model Law which went a long way towards meeting them. If a point-of-sale payment system involved a debit transaction, that transaction would be specifically excluded under the definition of the term "payment order". If it was a consumer system, its transactions would be excluded by virtue of the footnote to article 1. He saw no reason why point-of-sale systems should be excluded from the operation of the Model Law. In the future such systems might be used for commercial transactions and it would not be right for them to be explicitly excluded. His delegation therefore favoured the deletion of the sentence in square brackets.

38. The CHAIRMAN noted that a majority of speakers appeared to favour the deletion of that sentence.

39. He invited the Commission to comment on the last sentence of article 2(b), dealing with the question of unconditionality of payment orders.

40. Mr. SCHNEIDER (Germany) recalled that the Working Group had discussed conditional payment orders at some length and had reached broad agreement on the importance of certainty for banks involved in the payment process. His delegation had originally taken the view that the number of conditional payment orders was small. However, it had recently become aware of a trend towards the imposition of conditions by some banks, actuated by the wish to offer the public new types of product. A typical condition might be a statement that payment would only be made when the beneficiary had provided his bank with certain types of document.

41. Such products were outside the purview of the Model Law, but there seemed no reason why it should prevent banks from taking advantage of evolving techniques. A situation in which, because conditional instructions were excluded from the operation of the Model Law, one body of rules of law, namely the Model Law, governed unconditional payment orders while another governed conditional payment orders was inherently undesirable. There was, of course, nothing to compel a bank to accept a conditional payment order, so it could decide itself whether to do so or not.

42. Mr. ABASCAL ZAMORA (Mexico) referred to his Government's written comments (A/CN.9/347, pp. 41-42), in which an alternative text was proposed for the last sentence of article 2(b). He wished both to explain the reasons for his Government's proposal and also to refer to the comments made by the representative of Germany.

43. In the Working Group the proposal by the representative of the United States of America to exclude conditional payment orders altogether had met with considerable opposition. Because of the abstract nature of electronically processed transactions it had been thought essential to establish clearly that payment orders covered by the Model Law had to be unconditional.

44. The representative of Germany had referred to the fact that some banks did accept and execute conditional payment orders. Misunderstandings might arise where a conditional payment order was executed and a later occurrence unconnected with the conditionality of the payment supervened. The parties to the transfer might then find themselves deprived of their rights under the Model Law. Accordingly it had been decided that when a receiving bank received a conditional payment order, the fact that a bank had executed it would not necessarily mean that parties entitled to the benefit of the Model Law were deprived of their rights. That in turn had led to an attempt to devise new language according to which the principle would be contingent on the fulfilment or otherwise of the condition, i.e. the parties to the transfer might be covered by or excluded from the Model Law according to whether the condition was met. If it was not, the rights and obligations of the parties under the Model Law would not apply. The Working Group's decision had been that if an order was conditional, it was not a payment order, but if a receiving bank carried it out in accordance with the Model Law, the rights and obligations of the parties to the transfer would come into play.

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45. His Government's proposed amendment to the final sentence of article 2(b) was simply an attempt to reflect the decision taken by the Working Group. It did to some extent also reflect the concerns of the German delegation. He agreed that conditional payment orders would not be abstract in the sense of credit transfers and would therefore not normally be covered by the Model Law; if, however, parties agreed to them, banks wishing to accept conditional payment orders could do so without affecting the abstract nature of the transfer or the underlying policy. His Government's insertion of the term "originator's bank" in square brackets in its proposal was intended as a means of restricting the meaning of the sentence.

46. Mr. AL-NASSER (Observer for Saudi Arabia) said that, although he personally approved the definition of a payment order as an unconditional instruction, he saw a need to address the category of conditional payment orders; as the representative of Germany had indicated, some banks were increasingly accepting and executing them. At the same time, as the representative of Mexico had rightly said, a conditional payment order was not to be considered a payment order within the meaning of the Model Law.

47. Following discussions with some Saudi Arabian banks on the Model Law proposals, he favoured the idea of allowing a margin of manoeuvre to the parties to such a contract. He took the view that banks which accepted conditional payment orders should be able to continue to do so without forfeiting their rights under the Model Law.

48. Mr. BURMAN (United States of America) wished to associate his delegation with the proposal made by the Government of Mexico. To his delegation's way of thinking, if a bank chose to accept from a customer a document imposing certain conditions with respect to the execution of a payment order, the manner in which it did so was a matter for its own judgement. It was for the bank to decide whether the conditions were satisfied or whether it had the authority to execute the payment order. If at that point the bank executed the order, presumably without conditions, it was a matter between the customer and the bank whether it did so properly, and it would not be right to deny it the benefits and obligations of the Model Law out of hand.

49. Turning to the statement made by the representative of Germany, he said that his delegation understood the concern felt over the many documents which banks issued with conditions attached to the payment process, whether they were called letters of credit, standby letters of credit or credit documents. Whatever they might be called, they related to a greater or lesser extent to underlying transactions of some sort which were covered by the working group at present engaged in discussing the issue of bank guarantees.

50. To his mind, to confuse those in one law would lead to the inevitable dilution of the focus of the Model Law and, predictably, leave the Model Law without the possibility of impact in the commercial world. He hoped that course would not be adopted. It was true that different specialities of commercial law dealt with discrete areas of transactional events between parties. It would be most beneficial if the present draft could remain

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focused on payment orders and the credit transfer process and leave management conditions to other areas of commercial law being pursued by another working group. The draft Model Law was, in his view, not the place to deal with those subjects.

51. Mr. GREGORY (United Kingdom) referred to the comments of the representative of Mexico regarding his Government's proposal for the last sentence of article 2(b). He agreed that the Working Group had decided that the question whether or not a condition had been satisfied should be outside the Model Law. It was therefore true that the present wording of the sentence might not fully reflect the wishes of the Working Group. However, he was not sure that he knew exactly how the Mexican proposal would work; the point that caused him particular difficulty was the words "for the purposes of this law", because they suggested to him that the Mexican proposal amounted to the existing wording of the sentence without the qualification "but the condition is subsequently satisfied". If that was so, it would no longer be clear when an order of the kind in question came within the scope of the Model Law. Since the aim of the Model Law was to create certainty, he asked the Mexican representative to explain how conditional payment orders would become subject to the Model Law.

52. Mr. ABASCAL ZAMORA (Mexico) replied that he was in complete agreement with the representative of the United Kingdom. He believed that the points raised were linguistic ones and could be treated as a matter of drafting.

53. Mr. DE BOER (Netherlands) said that he had reacted to the Mexican proposal in the same way as the representative of the United Kingdom. He did not see how one could say that a condition would be deemed not to have been made because it was not fulfilled. The Model Law was written for unconditional payment orders; the rules of the Model Law should accordingly not apply where conditions were attached. He suggested that the point might be met, if it was decided to include conditional payment orders in some way, by saying that the provisions of the Model Law applied to conditional payment orders to the extent that the conditional character of the order permitted.

54. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that the definition of a payment order as an unconditional instruction was in line with general banking practice. He instanced cheques, which were always unconditional.

55. Ms. KOSKELO (Observer for Finland) said that her delegation considered the present text preferable to the Mexican proposal because the effect of the latter would be that a receiving bank would be allowed under the Model Law to treat a conditional payment order as if it were unconditional. She believed that had not been the intention of the Working Group and that the requirement in the present draft that the condition subsequently be satisfied was an important one. If that requirement were left out, a situation would be created in which receiving banks could treat conditional payment orders as if they were unconditional and disregard the fact that they had conditions attached to them.

56. Mr. ABASCAL ZAMORA (Mexico) replied that the effect of his Government's proposal would not be as understood by the delegation of Finland. A bank receiving a conditional payment order would be well aware that it was not receiving an unconditional payment order within the meaning of the Model Law. The decision of a bank to execute a conditional payment order because it had a contract with a customer was one thing; the fulfilment or not of a condition was another and was outside the purview of the Model Law.

57. Referring to the comments on the definition of a payment order in paragraphs 73-75 of the Working Group's report on its twenty-first session (A/CN.9/341), he said that his delegation's conclusion was that if a bank decided to execute a conditional payment order it would carry it out as if it were an abstract credit transfer. His delegation was emphatically not advocating giving the bank the right to decide whether or not a payment order was conditional.

58. The CHAIRMAN agreed that the Model Law should not deal with the question of whether conditions were or were not legally satisfied. It seemed to him that much uncertainty surrounded the present wording of the last sentence of article 2(b) and that the proposal of the Government of Mexico went some considerable way towards dispelling it.

The meeting rose at 5.05 p.m.